Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JUDY BAAR TOPINKA, STATE TREASURER, STATE OF ILLINOIS,

Petitioner,

v.

COMMONWEALTH EDISON COMPANY and TRUSTEES OF THE COMMONWEALTH EDISON COMPANY SERVICE ANNUITY FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Employee Retirement Income Security Act of 1974 (ERISA) expressly supersedes any State law insofar as the State law "relate[s] to" an employee benefit plan. The Illinois Uniform Disposition of Unclaimed Property Act provides that when unclaimed for five years, any intangible property in the possession of any fiduciary is presumed abandoned and is to be delivered into the protective custody of the Department of Financial Institutions of the State of Illinois.

The question presented by this petition is:

> Is Illinois' general unclaimed property statute preempted by ERISA when applied to pension plan benefits held by Commonwealth Edison Company's pension plan, an ERISA fiduciary, and unclaimed by the beneficiary for more than five years?

LIST OF ALL PARTIES

The caption of this petition lists as respondents all of the appellees in the proceeding in the Court of Appeals.

The petitioner herein is Judy Baar Topinka, the State Treasurer of Illinois. The appellant in the Court of Appeals was Sarah D. Vega, Director of the Department of Financial Institutions, State of Illinois. Although Ms. Vega was the proper appellant in the Court of Appeals, the State Treasurer of Illinois is the petitioner named herein because, as of July 1, 1999, all the rights, powers, duties, and functions previously vested in the Department of Financial Institutions with respect to the administration of the Illinois Uniform Disposition of Unclaimed Property Act were transferred by statute to the State Treasurer. Ill. Public Act 91-0016, §5; 15 ILCS 505/0.02.

The petitioner is not a corporation; no disclosure of parent companies and subsidiaries pursuant to Rule 29.6 is required.

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Petitioner Judy Baar Topinka, State Treasurer of Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that declared that ERISA preempts the State of Illinois' Uniform Disposition of Unclaimed Property Act as applied to unclaimed pension plan benefits.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1-9) is reported at *Commonwealth Edison Company v. Vega*, 174 F.3d 870 (7th Cir. 1999). The underlying opinion of the District Court (App., *infra*, 10-31) is unreported.

STATEMENT OF JURISDICTION

On April 13, 1999, the Court of Appeals entered its opinion and judgment affirming the judgment of the District Court. 28 U.S.C. §1254(1) confers upon this Court the jurisdiction to review on a writ of certiorari a judgment entered in a case in a federal court of appeals.

STATUTORY PROVISIONS

The preemption provision (§514(a)) of the federal Employee Retirement Income Security Act of 1974 (ERISA) states, in pertinent part, that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefits plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. §1144(a).

The fiduciary property provision of the Illinois Uniform Disposition of Unclaimed Property Act states, in pertinent part, that "[a]ll intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within 5 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary . . . ." 765 ILCS 1025/7 (1998).

STATEMENT OF THE CASE

Since 1961, there has been in effect in Illinois an unclaimed property law that deals comprehensively with all kinds of intangible property that is presumed abandoned upon expiration of a period of time after the property becomes payable or distributable. Illinois' Uniform Disposition of Unclaimed Property Act provides for the abandoned property to be taken into the State's protective custody; the State becomes the custodian in perpetuity, thereby safeguarding that property for the lost or missing owner and preserving it for delivery whenever that owner comes forward to claim it. It covers property held by any fiduciary. It does not explicitly address ERISA plans and does not single out such plans for special treatment or create rights or duties unique to such plans.

Commonwealth Edison Company, an Illinois public utility, is a fiduciary of its pension plan, called the Service Annuity System. The plan is a defined-benefit employee pension plan subject to ERISA requirements. It is solely funded by the Company, which also pays almost all of the expenses incurred in its administration. Vested annuity payments to participants and beneficiaries are made bi-monthly from a checking account maintained by the plan trustees. The amount of funds in the checking account are kept at levels sufficient to pay benefit checks issued. The plan documents contain no provision requiring benefit check payees to cash their checks within a certain time. If a benefit check is not cashed within one year, however, that check is written-off, the checking account is reduced by the amount of the uncashed check, and the

funds allocated for payment of the uncashed check become available to the plan to pay benefits to other benefit payees.

The plan documents do not address what disposition is to be made of uncashed checks or the payment of stale-dated checks; neither do they provide for forfeiture or subsequent reinstatement of unpaid benefits due to lost or missing payees. As a matter of administrative practice, however, the System has been paying claims by payees holding uncashed benefit checks even though those checks were uncashed for years. The sum of approximately $125,000 is now due to benefit check payees who have not cashed their benefit checks for more than five years after those checks were issued.

On January 2, 1997, Commonwealth Edison Company and the trustees of its employee pension fund commenced an action in the District Court, seeking a declaratory judgment that ERISA preempts the Illinois Uniform Disposition of Unclaimed Property Act as it applies to the pension fund's obligations for vested benefits represented by benefit checks that have been uncashed for over five years after their issuance. The District Court had jurisdiction of that action pursuant to 29 U.S.C. §1132(e)(1), which grants that Court exclusive jurisdiction of civil actions brought by an ERISA fiduciary. Since that action also involved construction of ERISA's preemption provision, the District Court also had jurisdiction under 28 U.S.C. §1331, which grants that Court original jurisdiction of all civil actions arising under federal law.

On May 8, 1998, the District Court held that ERISA preempts the Illinois unclaimed property act. It con-

cluded that "this suit lies in the netherworld between clearly preempted suits which implicate the interpretation or administration of an ERISA plan and suits that merely address the relationship among parties incidental to the administration of beneficiaries' rights under a plan" (App., *infra*, 24). While recognizing that "there are pros and cons to each side's position," it determined that it was not the Court's task "to divine the best possible interrelationship between ERISA and the [Illinois unclaimed property act]" (App., *infra*, 28, 31). Instead, the District Court deferred to United States Department of Labor Advisory Opinion 78-39, dated December 22, 1978, which concluded that ERISA preempts the Illinois unclaimed property law because ERISA does not merely preempt state laws which conflict with ERISA, but all state laws related to employee benefit plans.

On the appeal from the District Court judgment taken by the Illinois administrator, the Court of Appeals affirmed, holding that State unclaimed property laws are preempted by ERISA because they "directly and substantially" (App., *infra*, 4) relate to an ERISA plan by (1) depleting plan assets by confiscating the accrued interest that could be earned on the uncashed pension benefits and (2) usurping the administration of plan assets themselves. It found that State unclaimed property laws are a "device by which the state appropriates" for itself "the interest value of the money" that the plan would use to pay the uncashed pension benefit when claimed by the payee (App., *infra*, 5). Even though the Commonwealth Edison Company plan did not have a provision for the payment of any accrued interest to a payee, retention of the unclaimed benefits

allows the plan itself to earn interest until the payee claims the benefit; thus, plan assets would grow and "the less money Com Ed will be required to contribute to it to make sure that the plan has enough to meet its obligations" (App., *infra*, 4).

The Court of Appeals further found that State unclaimed property laws usurp the administration of an ERISA plan because until a pension is actually paid to the beneficiary, the money due to the beneficiary remains an asset of the plan. If the money to pay an unclaimed benefit was delivered to the State even after a benefit check remained uncashed for more than five years, the court reasoned, the State would then become the plan administrator, in violation of ERISA's provisions that plan assets be held for the exclusive purpose of providing benefits and defraying administration expenses (App., *infra*, 4-5). The court found no need to consider deference to the Department of Labor Advisory Opinion, noting a "complication" in deferring in this case, namely the issue "whether it is appropriate to defer to an agency that is seeking to expand federal power at the expense of the states through a generous construal of a preemption clause" (App., *infra*, 8). At the same time, it noted that the United States Department of the Treasury had issued a regulation "that can be interpreted to assume that uncashed ERISA plan benefits are subject to state escheat laws" (App., *infra*, 9).

REASONS FOR GRANTING THE WRIT

There are two reasons why this petition should be granted. First, the decision of the Court of Appeals for the Seventh Circuit, holding that ERISA preempts Illinois' unclaimed property act, conflicts with that of the Court of Appeals for the Second Circuit in *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 149 (2d Cir. 1989), *cert. denied*, 493 U.S. 811 (1989), which held that ERISA does not preempt Connecticut's unclaimed property act "as it applies to uncollected drafts for employee benefits." Second, the Seventh Circuit decided this case in a manner that is wholly inconsistent with the ERISA preemption analysis mandated by this Court, ignoring the presumption against preemption while at the same time disregarding and derogating the State of Illinois' public policy concerning the disposition of abandoned property, a legitimate public concern that arises in the absence of any contrary or applicable federal policy. As acknowledged by the District Judge below, the issue presented by this case is "important" (App., *infra*, 31).

A. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION IN THIS CASE AND THE SECOND CIRCUIT'S DECISION IN *BORGES*.

The holding of the Seventh Circuit below conflicts with that of the Second Circuit in *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 149 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989). This Court should grant review to resolve that conflict on an important issue that could

effect substantial sums in unclaimed intangible property.

In *Borges,* the Second Circuit held that "ERISA does not preempt Connecticut's escheat law[1] as it applies to uncollected drafts for employee benefits." *Id.* Consistent with the ERISA preemption analysis that would later be prescribed by this Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the *Borges* court explained that "[t]he purpose of Congress is the ultimate touchstone in determining whether a federal law preempts a state law." *Borges,* 869 F.2d at 144. The Second Circuit began its analysis with the assumption that, unless Congress' purpose to preempt is clear and manifest, the historic police powers of the State are not to be superseded. *Id.* It found that ERISA "does not prescribe any particular procedure for the handling of benefits that are awarded but uncollected" and does not "specify a time limit for honoring such claims." *Id.* In contrast, it also found that the "escheat of abandoned property is an area of traditional state authority." *Id.*, at 147. According to the court, the escheat law "does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally." *Id.* It has "no effect" on the original determination of an employee's eligibility for benefits. *Id.* It does not provide

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[1] The custodial taking of property presumed abandoned is often subsumed under the concept of escheat. As explained by this Court, "[s]tates as sovereign may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware v. New York*, 507 U.S. 490, 497 (1993) (footnote omitted).

beneficiaries "with an alternative cause of action for recovering benefits." *Id.*, at 148. Its procedures for returning unclaimed property to the previously lost or missing owner "are no more complex" than those if a claim was made to the plan and essentially involve "presentation of proper identification." *Id.*

With the State serving as custodian for the missing beneficiaries, the Second Circuit pointed out that State escheat law actually "may aid beneficiaries." *Id.* It also found that escheat "poses no greater threat of inconsistency among state laws than does garnishment," a State process that is not preempted by ERISA. *Id.*, at 147. The Court rejected the notion that increased costs to an ERISA plan resulting from application of a State law by itself requires that the State law be invalidated (*id.*); "'if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress.'" *Id.*, at 145, (quoting *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)). The Second Circuit concluded that "[a]bsent more specific direction from Congress, [the Court] can safely assume that Congress did not intend to create [for ERISA plans] an exception to this traditional exercise of state authority." *Borges*, 869 F.2d at 147-48.[2]

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[2] This decision of the Second Circuit is in accord with that of the Michigan Court of Appeals in *Attorney General v. Blue Cross & Blue Shield of Michigan*, 424 N.W.2d 54 (Mich. App. 1988), *leave to appeal denied*, 432 Mich. 888 (1989), which held that Michigan's unclaimed property law was not preempted by ERISA. The court found escheat to be a traditional ex-

(continued...)

In addition, relying upon the Second Circuit's decision in *Borges*, the Court of Appeals for the Eighth Circuit has also concluded that "state garnishment and escheat statutes do not shift control over benefit distribution," and "[n]either do they negate a proper ERISA provision." *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341, 1347 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992).

The Seventh Circuit's attempt to distinguish *Borges* by distinguishing escheat statutes from unclaimed property statutes like that in force in Illinois (App., *infra*, 7-8) is unavailing. *Borges* cannot be so distinguished

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[2] (...continued)
ercise of state authority; that the Michigan statute affected the plan only because it is the holder of abandoned property rather than because it was an ERISA entity; that the law did not affect the structure, administration, or type of benefits provided by the plan; and that "the mere fact that [the Michigan statute] has some impact on a plan does not require its preemption by ERISA." *Id.* at 59. The Michigan statute at issue expressly provided, without limitation, that an owner could claim the property from the State at any time. 19 Mich. Stat. Ann. §26.1053(53)(1) (Lawyers' Coop. 1993). The Seventh Circuit in the instant case was thus wrong when it attempted to distinguish the Michigan case by asserting that it was an escheat case in which title would have vested in the State (App., *infra*, 7-8). As the Michigan legislature stated, the Michigan Code of Escheats, "in all of its provisions, is intended to be a trustee and conservator measure for the initial purpose of marshaling, protecting and preserving the property rights and interests of the absent, incapacitated or missing owners of property, . . . whose rights and interests in such property it is the duty of government and law to protect. . . ." 19 Mich. Stat. Ann. §26.1053(64) (Lawyers' Coop. 1993). The Michigan Code of Escheats was, in fact, repealed and replaced by a version of the Uniform Unclaimed Property Act (1981), effective January 1, 1996 (Public Acts 1995, No. 29.).

because the action in that case was one for custody, not for the escheat of the abandoned property. The Connecticut statute's fiduciary property provision at issue in *Borges*, Conn. Gen. Stat. Ann. §3-61a (West 1988), was almost identical to that in the Illinois act. It imposed upon a fiduciary holding the property due to another a duty to "pay or deliver [abandoned] property to the treasurer and file, on forms which the treasurer shall provide, a report of unclaimed property." *Id.*, §3-65a(b). Only when the abandoned property was in the custody of the State Treasurer for more than twenty years was the Treasurer allowed to apply to the Superior Court for a judicial determination of escheat, a subsequent proceeding the authorization for which was repealed in 1994 (P.L. 94-184 §3).[3]

Thus, the unclaimed property laws involved in the instant case and that in *Borges* were not materially different insofar as their definitions of the subsisting rights of the lost or missing beneficiary to claim the property from the State's custody. The decisions of the Second and the Seventh Circuit are irreconcilable, leaving in doubt the relationship between ERISA and State unclaimed property laws concerning the disposition of abandoned pension benefits.

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[3] A state's right to escheat ownerless property exists independent of its unclaimed property law. On satisfaction of due process requirements of notice and an opportunity to be heard, a state may take title to such property. *Hamilton v. Brown*, 161 U.S. 256 (1896).

B. THE DECISION OF THE SEVENTH CIRCUIT RUNS AFOUL OF ESTABLISHED LAW REQUIRING A PRESUMPTION AGAINST PREEMPTION AND DEFERENCE TO STATE POLICY.

Since this Court's decision in *Travelers Insurance Co.*, a strictly literal reading of the concept of State laws that "relate to" ERISA has been rejected, along with the "connection with" test, which was found to be "an uncritical literalism [that] is no more help than in trying to construe 'relate to.'" *Id.*, 514 U.S. at 656. The overarching principle now underlying ERISA preemption analysis is the strong presumption that "Congress does not intend to supplant state law." 514 U.S. at 654-56. The Seventh Circuit, however, entirely ignored this approach to ERISA preemption analysis. Its decision shows no recognition of the presumption against preemption and no consideration for the salutary purposes and the public policy underlying State unclaimed property laws.

Underlying the Seventh Circuit's decision is the unprecedented and erroneous view that the crux of the litigation between the plan and company on one side and the State on the other was "who gets to keep the interest on th[e] money" used to pay the unclaimed pension benefits (App., *infra*, 4). No other court has ever disregarded the public policy underlying State unclaimed property laws by focusing exclusively on the supposed interest value of money. Long ago the Supreme Court found that "it is within the constitutional power of the state to protect the interests of [missing or lost owners] from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively aban-

doned." *Anderson National Bank v. Luckett*, 321 U.S. 233, 241 (1944). The Supreme Court has described the State's role concerning unclaimed property as that of a conservator of a missing person's property. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948). Additionally, the Supreme Court has stated that "[i]f [unclaimed property] is turned over to" the state, in obedience to a valid law, the obligation of the [holder of the property] to the [missing owner] is discharged." *Security National Bank v. California*, 262 U.S. 282, 286 (1923).

Consistent with this unclaimed property jurisprudence, in *People ex rel. Fahner v. Chicago Transit Authority*, 127 Ill. App. 3d 405, 408, 468 N.E.2d 1316, 1318 (1984), the Appellate Court of Illinois stated that the policy behind the Illinois Uniform Disposition of Unclaimed Property Act was to protect the rights of unknown owners. In light of this expressed policy in favor of state custody of abandoned property, and of the presumption that Congress does not intend to supplant state law, the Seventh Circuit should have been required to show that it was the clear and manifest purpose of Congress to have the pension plan take the interest value of money to pay unclaimed pension benefits. Nowhere in its discussion about the interest value of money did the court mention some relevant Congressional intent or cite any authority establishing that Congress ever contemplated such a matter. To the contrary, to permit an ERISA plan to retain unclaimed property so as to gain the interest value that might be earned on the property, a permission enjoyed by no other holder of unclaimed property, accords to the plan "a charmed existence that never was contemplated by

Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Accordingly, in substituting its views about State unclaimed property laws for those of this Court and State courts, the Court of Appeals violates the principle of federalism that "[a] federal court's independent determination of policy is quite irrelevant, . . . if it is inconsistent with the State law which the court is obliged to follow." *System Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131, 1142 (3d Cir. 1977).

CONCLUSION

For the reasons stated, this Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2417

COMMONWEALTH EDISON COMPANY and TRUSTEES OF THE COMMONWEALTH EDISON SERVICE ANNUITY FUND,

Plaintiffs-Appellees,

v.

SARAH D. VEGA, in her official capacity as Director, State of Illinois Department of Financial Institutions,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 6—**Blanche M. Manning**, *Judge.*

ARGUED FEBRUARY 16, 1999—DECIDED APRIL 13, 1999

Before POSNER, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* Commonwealth Edison Company and its defined-benefit pension plan brought this suit under ERISA, 29 U.S.C. §§ 1001 *et seq.*, against the administrator of the Illinois Uniform Disposition of Unclaimed Property Act, 765 ILCS 1025, seeking a declaration that ERISA preempts the Illinois statute to the extent that the statute regulates such plans. The district court agreed, precipitating this appeal by the state. A threshold ques-

tion unremarked by the parties or the district judge concerns the state's Eleventh Amendment immunity to being sued in a federal court without its consent. A suit against a state officer in his or (in this case) her official capacity is deemed a suit against the state, e.g., *Kentucky v. Graham*, 473 U.S. 159, 169-70 (1985); *V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415, 1421 (10th Cir. 1997), and a mere failure to raise an Eleventh Amendment defense in court is not treated as a waiver, e.g., *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Estate of Porter by Nelson v. Illinois*, 36 F.3d 684, 691 n. 3 (7th Cir. 1994); *V-1 Oil Co. v. Utah State Dept. of Public Safety, supra*, 131 F.3d at 1419-20; *Suarez Corporation Industries v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997), even though the Supreme Court has now made clear that a violation of the Eleventh Amendment does not deprive the federal court of jurisdiction over the suit. *Patsy v. Board of Regents*, 457 U.S. 496, 515 n. 19 (1982); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). But the only relief sought by the plaintiffs in this case is an injunction against enforcing a state statute that they contend is unenforceable by virtue of the supremacy clause of the Constitution, and that is relief equally available, with no Eleventh Amendment hurdle to overcome, by a suit against the responsible official in her private capacity. See *Idaho v. Coeur d'Alene Tribe of Idaho, supra*, 521 U.S. at 269, for the general principle, and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n. 14 (1983), and *Burgio & Campofelice, Inc. v. New York State Dept. of Labor*, 107 F.3d 1000, 1006-07 (2d Cir. 1997), for its application to ERISA. In consequence, federal suits against state officials for purely injunctive relief are treated in effect as suits against them in their personal capacity, lifting the Eleventh Amendment bar. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n. 10 (1989); *Kentucky v. Graham, supra*, 473 U.S. at 167 n. 14.

The Uniform Disposition of Unclaimed Property Act, in force in about a third of the states, requires anyone in possession of intangible property that is unclaimed by its owner for seven years (five under the Illinois version of the Act) to transfer the property to the custody of the state. A subsequent uniform law, the Uniform Unclaimed Property Act of 1981, is in force in most of the rest of the states; so far as relates to this case, the provisions of the two uniform laws are the same. These are not escheat statutes. The state does not acquire title to the property. It is merely a custodian. The owner can reclaim his property at any time. Prefatory Note to 1995 Act, 8B *Uniform Laws Annot.*, 1998 Supp. 84. But not only does the state have the free use of the property unless and until the owner reclaims it; the state is not required to (and Illinois does not) pay any interest to a reclaiming owner. 765 ILCS § 1025/15; see also Uniform Unclaimed Property Act of 1981, § 21 (§ 11 of the 1995 revision of this Act). In effect, the property is an interest-free loan to the state—in perpetuity if the owner never shows up to claim it.

Illinois seeks to apply the Uniform Act to benefits payable under Com Ed's pension plan that are not claimed by a plan beneficiary within five years. When benefits are due to a participant in the plan, the plan writes a check to the participant. Until the participant deposits or cashes the check and the check is paid by the plan through the system for clearing bank transactions, the money due the participants remains in the plan's coffers. It is placed in a separate account as soon as the check is written, but if the check isn't cashed within a year the money is retransferred to the general account and is available to pay other participants. Com Ed does not and could not (without adverse tax consequences) impose a deadline on when the beneficiary may cash his check. See 26 C.F.R. § 1.411(a)-4(b)(6). It could be five, or ten, or even more than ten years after the check was written. All this time the plan will have the use of the money due the beneficiary. Were

the plan to be terminated, the administrator would have a legal duty to search and make provision for missing beneficiaries. 29 U.S.C. §§ 1056(f), 1350. But until then, the plan's only duty of search is whatever is implicit in the fiduciary obligation that ERISA imposes on plans. 29 U.S.C. § 1104(a).

The Com Ed plan owes about $125,000 to beneficiaries who have not yet cashed or deposited their checks even though more than five years have passed since the checks were written. The state wants this money. The plan wants to retain it. Com Ed wants the plan to retain it too, for even though money in the plan cannot be kicked back to Com Ed unless and until the plan is terminated and is determined to be overfunded, 29 U.S.C. § 1344(d); *Mead Corp. v. Tilley*, 490 U.S. 714, 718 (1989); *Brillinger v. General Electric Co.*, 130 F.3d 61, 62 (2d Cir. 1997), the more money there is in the plan, the less money Com Ed will be required to contribute to it to make sure that the plan has enough to meet its obligations. 26 U.S.C. §§ 412(a), (b)(3); *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 761 (1999); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 363-64 n. 5 (1980). The parties are thus fighting over who gets to keep the interest on this money—the plan, and perhaps ultimately Com Ed, or the state.

ERISA preempts any state regulation that "relates to" an ERISA plan. 29 U.S.C. § 1144(a); *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 809 n. 1 (1997); *Dranchak v. Akzo Nobel Inc.*, 88 F.3d 457, 459 (7th Cir. 1996). The Uniform Act, although it does not refer explicitly to ERISA plans, relates to the Com Ed plan directly and substantially. Remember that until the check to the beneficiary is actually presented to the plan for payment through the banking system, and paid, the money due to the beneficiary is an asset of the plan. The state thus wants to take a chunk of an ERISA plan's assets and put it in the state treasury. After that happens, any beneficiary of the plan who wants his benefits will

have to apply to the state for them. The state becomes the plan administrator with respect to those assets. Not only does the state become the custodian of the assets, in violation of ERISA's provisions regarding plan administration, especially 29 U.S.C. § 1103(c)(1); see *Boggs v. Boggs*, 520 U.S. 833, 845-46 (1997); it depletes those assets, by taking the interest that accrues on them. If the ERISA plan entitled a beneficiary to interest for the period between when benefits were due him and when he actually collected them, the state would actually be reducing his ERISA benefits. Even if the plan does not provide for interest, as Com Ed's does not, the state would still be reducing the plan's assets. Suppose the benefits due the participant in year t are $10,000, and he doesn't claim them until year $t+6$, by which time $10,000 in plan assets would have grown through the operation of compound interest to $14,000. Then, were it not for the Uniform Act, the assets of the plan would be greater by $4,000. The Act is the device by which the state appropriates those assets for itself.

It depletes those assets in another way, by subjecting the plan to the varying laws of the different states. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657-58 (1995). Participants in the Com Ed plan are scattered over 44 states. Though there are only two basic state-law regimes governing unclaimed property (the two uniform laws), states have tended to custom-tailor whichever uniform law they have chosen to their particular needs. The consequence is numerous variations in the amount of time before the state takes over the money (recall that Illinois has shortened the period of the Uniform Disposition of Unclaimed Property Act) and in the formalities for claiming the money from the state. Russell E. Greenblatt, "ERISA Preemption of State Unclaimed Property and Escheat Laws," 9 *Benefits L.J.* 51 (1996). Several states have not even modeled their

unclaimed-property laws on either of the uniform laws, but have gone their own way completely.

We do not put too much weight on this point, because Com Ed has made no effort to quantify the burden of compliance. We are more concerned about the confiscation of interest and the usurpation of administration. At argument we asked the state's lawyer whether it would make any difference to his argument if the Illinois version of the Uniform Disposition of Unclaimed Property Act required the plan to hand over benefits unclaimed for two weeks rather than five years, and he said it would not. In such a case it would be blindingly obvious that the state was taking over the administration of an ERISA plan; it is only a little less obvious when the period is longer.

The state reinforces this characterization of the operation of the Uniform Act when it argues that its having custody of the unclaimed benefits gives the beneficiaries more secure protection than the retention of custody by the plan would. The State of Illinois has better credit than Commonwealth Edison. And while the pension plan is funded—that is, its assets, which Com Ed cannot touch, are actuarially equivalent to its expected obligations to participants and beneficiaries, 29 U.S.C. § 1082; *Hughes Aircraft Co. v. Jacobson, supra,* 119 S. Ct. at 761-62 (1999), and vested benefits under a defined-benefits plan are federally insured, 29 U.S.C. §§ 1322, 1361, participants and beneficiaries are not completely protected. Actuarial projections are by definition probabilistic rather than certain, and the federal insurance is capped at a fairly modest level. § 1322(b)(3); *Mertens v. Hewitt Associates,* 508 U.S. 248, 250 (1993). So state custody does add a dollop of safety to unclaimed ERISA benefits, though given the State of Illinois's reputation as a late payer, the tiny increment in safety may well be offset by delay in payment and resulting loss in the interest value of the money. In any event, ERISA's preemption clause, and the case law interpreting it, make clear that a state cannot take over

the operation of an ERISA plan, no matter how forcefully it argues that it can do a better job than the plan's trustees and administrators. See *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829-30 (1988); cf. *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 104-06; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981); *Maclean v. Ford Motor Co.*, 831 F.2d 723, 727-28 (7th Cir. 1987).

The state argues that *Mackey v. Lanier Collection Agency & Service, Inc., supra*, 486 U.S. at 835-38, which holds that ERISA does not preempt the application of state garnishment statutes to employee welfare plans, controls the present case. A vital distinction is overlooked. If an ERISA beneficiary owes money, the creditor can use garnishment to get that money from the plan rather than having to wait until it is paid out to the beneficiary. But the state in such a case is not taking plan assets or administering the plan. It is merely eliminating an intermediate transaction in the process by which benefits are paid to the beneficiary and seized by the creditor. The amount of assets in the plan is unaffected by whether the money is checked out to the beneficiary or the beneficiary's creditor.

Two cases uphold the application of state escheat laws to unclaimed benefits under ERISA plans, *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989), and *Attorney General v. Blue Cross & Blue Shield of Michigan*, 424 N.W.2d 54, 58-59 (1988) (per curiam). A third disagrees. *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F.2d 1501 (11th Cir. 1986) (per curiam). We need not takes sides. Escheat laws determine title. If state law vests title to the state in unclaimed benefits, those benefits no longer belong to the beneficiary; they belong to the state. In fact, the state *is* the beneficiary. Compare two cases. In one, the plan participant designates his spouse as the beneficiary if the participant dies. He dies, and so the benefits are paid to the surviving spouse. This is no more a depletion of fund assets than when the

benefits are paid to a creditor. In the other case, the plan participant has failed to designate a beneficiary, and suppose that the state, by operation of its escheat law (which makes the state in effect the heir of the heirless), becomes the beneficiary. Just as in the first case, payment to the state, if the participant dies, does not deplete the assets of the fund; it is simply payment to the participant's designated-by-law beneficiary.

This case is different because the state does not claim to have an ownership interest in unclaimed benefits. It doesn't want to step into the shoes of the beneficiary; it wants to step into the plan's shoes. That is precisely what ERISA bars. So clear is this (see *Chevron, USA Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)) that we don't have to get into the issue, much discussed in the briefs, of the precise weight to be given the Department of Labor's advisory opinion letters (and its amicus curiae brief), which advise that ERISA indeed preempts state unclaimed-property laws. The issue of the weight to be given under the *Chevron* doctrine to informal expressions of agencies' views is unresolved, see *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 162 n. 3 (1993), and compare *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 302 (6th Cir. 1998), with *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583, 585 (7th Cir. 1998), with *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997), though *Auer v. Robbins*, 519 U.S. 452, 462 (1997), indicates that some deference, at least, is to be paid to views set forth in an amicus curiae brief filed by an agency. A further complication here is the uncertainty of whether it is appropriate to defer to an agency that is seeking to expand federal power at the expense of the states through a generous construal of a preemption clause. For varying views on *that* question, compare *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994), and *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th

Cir. 1997), with *Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991), and *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) (opinion of one judge). A final complication is that the administration of ERISA is shared between the Labor Department and the Treasury Department. Treasury has issued a regulation that can be interpreted to assume that uncashed ERISA plan benefits checks are subject to state escheat laws. 26 C.F.R. § 1.411(a)-4(b)(6). But we have seen that escheat laws are pertinently different from unclaimed-property laws. So there is no conflict between the two agencies and therefore no need to decide which should have the whip hand.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 10

[Dated May 8, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMONWEALTH EDISON COMPANY and THE TRUSTEES OF THE COMMONWEALTH EDISON SERVICE ANNUITY FUND, Plaintiffs,	)	
v.	)	97 C 0006
FRANK C. CASILLAS, in his official capacity as DIRECTOR, STATE OF ILLINOIS DEPARTMENT OF FINANCIAL INSTITUTIONS, Defendants.	)	

MEMORANDUM AND ORDER

This case turns on the reach of § 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), which is ERISA's preemption provision. 29 U.S.C. § 1144. Specifically, the parties dispute whether ERISA preempts the Illinois Uniform Disposition of Unclaimed Property Act ("IUPA"), 765 ILCS 1025/7, and thus prohibits the IUPA from reaching unclaimed pension benefit payments of employee benefit plans covered by ERISA. Plaintiffs Commonwealth Edison Company ("ComEd") and the Trustees of the Commonwealth Edison Service Annuity Fund (the "Trustees") seek a declaratory judgment against defendant Director of the Illinois Department of Financial Institutions (the "Director") finding that ERISA preempts the IUPA.

The parties have filed cross-motions for summary judgment and amicus curiae The National Association of Unclaimed Property Administrators and the Secretary of Labor have filed memoranda addressing the preemption issue. For the following reasons, the plaintiffs' motion for summary judgment is granted and, the defendant's cross-motion for summary judgment is denied.

I. Jurisdiction and Venue

According to the plaintiffs, jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1332(e) because ERISA preempts the IUPA. Federal question jurisdiction thus turns on this court's resolution of the preemption issue. The court notes, however, that venue in this district is appropriate pursuant to 28 U.S.C. § 1391(b), as the defendant maintains an office in this district, a substantial part of the events giving rise to the claim occurred in this district, and a substantial part of the property that is the subject of this case is located in this district.

II. Background

A. The Parties

Plaintiff ComEd is a public utility company that employs a workforce of over 16,800. It is a corporation organized under the laws of the State of Illinois, and maintains its principal offices in Chicago, Illinois. ComEd is the plan sponsor, the administrator, and a named fiduciary of the Commonwealth Edison Service Annuity System (the "Plan"), which is an employee pen-

sion benefit plan under ERISA, 29 U.S.C. §§ 1002(16) and 1102(a). The plaintiff Trustees, who are also members of ComEd's Board of Directors and its parent, Unicom Corporation, are "named fiduciaries" of the Commonwealth Edison Service Annuity Fund (the "ComEd Annuity Fund") under ERISA. 29 U.S.C. § 1102(a). The ComEd Annuity Fund is an employee benefit fund within the meaning of ERISA. 29 U.S.C. §§ 1002(2) and (3).

Defendant Frank Casillas is the Director of the State of Illinois Department of Financial Institutions and is sued in his official capacity. The State of Illinois Department of Financial Institutions ("DFI") is an agency of the State of Illinois. It maintains offices in Chicago and is responsible for administering the IUPA.

B. The Facts

The essential facts are undisputed. ComEd's Plan provides pension benefits to more than 9750 annuitants, who reside in 44 states. ComEd's Annuity Fund was created under a written agreement between ComEd and predecessors of the Trustees to establish a trust fund for the payment of service annuities under the Plan. In accordance with the terms of the agreement establishing ComEd's Annuity Fund, the assets of the Annuity Fund are maintained exclusively for the benefit of participants under ComEd's Plan. The ComEd Annuity Fund holds a general pool of assets for the benefit of all Plan participants. Individual Plan participants do not have separately identified accounts in the ComEd Annuity Fund or under ComEd's Plan.

A determinable annuity payment as computed under the Plan is payable to eligible annuitants each payment period after benefits payments commence. Eligible annuitants, as defined by the Plan, are entitled to regular annuity payments made from the ComEd Annuity Fund. These annuitants receive bimonthly service-annuity payments from the ComEd Annuity Fund, either by check or by direct deposit into their bank accounts.

To accommodate the issuance of the bimonthly payments, the Trustees maintain, as part of the ComEd Annuity Fund, a checking account from which benefit payments are made. The checking account constitutes part of the assets of the ComEd Annuity Fund. The checking account balance is kept at an adequate level to ensure that sufficient funds are available to cover checks issued for current benefit payments.

If a ComEd annuitant fails to cash a check issued pursuant to ComEd's Plan within one year, the amount of funds periodically transferred to the ComEd Annuity Fund's checking account is reduced by the amount of the uncashed checks. After one year, these amounts are considered assets available generally for payment of benefits under ComEd's Plan. The level of current assets available for payment of benefits is one of the many factors used in making the actuarial determination of the amount of contributions, if any, that ComEd should make to the Annuity Fund.

ComEd's Plan does not require annuitants to cash their benefit-payment checks within a certain time period in order to be entitled to receive the funds specified in their checks. The general practice of the ComEd Annuity Fund and the ComEd Plan is to honor

claims for payment of stale checks. DFI has advised ComEd of its position that the ComEd Plan is a holder of unclaimed property subject to the requirements of the IUPA, and has asked ComEd to file a report under the IUPA and to remit to DFI the value of benefit payment checks which have remained uncashed for more than five years.

The plaintiffs filed suit, seeking a declaratory judgment that ERISA preempts the application of the IUPA to obtain the value of annuity checks that are unclaimed and uncashed for more than five years. Amicus curiae the Secretary of Labor supports the plaintiffs, while amicus curiae the National Association of Unclaimed Property Administrators supports the defendant.

C. The Parties' Positions

ComEd argues that ERISA preempts the application of the IUPA to funds held in trust by ComEd's Plan, which, as noted above, is an employee pension benefit plan subject to ERISA. It asserts that, if the IUPA applies, it would have to make payments directly from the ComEd Annuity Fund to the Illinois Department of Financial Institutions, thereby reducing the amount of Plan assets held in trust for the benefit of all Plan participants and beneficiaries. ComEd also points to ERISA's broad preemptive reach, as well as an advisory opinion from the United States Department of Labor stating that ERISA preempts the IUPA and other states' escheat laws. Finally, ComEd argues that payment of the unclaimed funds to the State would violate ERISA's anti-alienation provision, 29 U.S.C. § 1056(d).

Amicus curiae the Secretary of Labor contends that the phrase "relate to" in § 514(a) encompasses the IUPA. In addition, the Secretary argues that the IUPA is preempted under general conflict preemption principles, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997), as well as because it mandates employee benefit structures and plan administration, and provides an alternative enforcement mechanism. Finally, the Secretary of Labor contends that the IUPA violates ERISA's prohibition against assignment or alienation of plan benefits.

The Director argues that the IUPA does not "relate to" the value of checks issued to annuitants under ComEd's Plan because Illinois' actions with respect to the IUPA affect the plan in a tenuous, remote manner. He also notes that the IUPA is a law of general application addressing abandoned property and does not expressly refer to ERISA plans. In addition, he contends that the IUPA fails to have a connection with any ERISA plans. Finally, he cites to *Aetna Life Insurance Company v. Borges*, 869 F.2d 142 (2d Cir. 1989), and *Attorney General v. Blue Cross & Blue Shield of Michigan*, 168 Mich. App. 372, 424 N.W.2d 54 (1988).

Amicus curiae the National Association of Unclaimed Property Administrators argues that giving the unclaimed funds to the State would not reduce the benefits available to the Plan's participants and beneficiaries. It also asserts that ComEd should not be permitted to use the unclaimed monies to offset its obligation to contribute and that doing so is a "prohibited transaction."

D. The Illinois Unclaimed Property Act

The relevant provisions of the IUPA provide:

> § 7. All intangible personal property and any income or increment thereon, held in a fiduciary capacity (other than as a trustee of an active express trust) for the benefit of another person is presumed abandoned unless the owner has, within 5 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary;
>
> (a) If the property is held by a banking organization or a financial organization, or by a business association organized under the laws of or created in this State; or
>
> (b) If it is held by a business association, doing business in this States, but not organized under the laws of or created in this State, and the records of the business association indicate that the last known address of the person entitled thereto is in this State; or
>
> (c) If it is held in this State by any other person.

765 ILCS 1025/7.

> § 20. (a) The Director shall consider any claim filed under this Act and may, in his discretion, hold a hearing and receive evidence concerning it. . . . The Director or hearing officer shall prepare a finding and a decision in writing on each hearing, stating the substance of any

> evidence heard by him, his findings of fact thereto, and the reasons for his decision. The Director shall review the findings and decision of each hearing conducted by a hearing officer and issue a final written decision. The final decision shall be a public record. Any claim of an interest in property that is filed pursuant to this Act shall be considered and a finding and decision shall be issued by the Department in a timely and expeditious manner.

765 ILCS 1025/20(a).

E. The Agency View of the Preemption Issue

As noted above, the Secretary of Labor has filed an amicus curiae brief supporting the plaintiffs. In addition, the United States Department of Labor issued an opinion letter addressing the impact of ERISA on the IUPA. U.S. Dept. of Labor Advisory Opinion 78-32A (1978). In that letter, the Administrator of Pension and Welfare Benefit Programs and the United States Department of Labor quoted the IUPA and § 514 of ERISA and concluded that ERISA preempts the IUPA, explaining:

> Section 514(a) does not merely preempt state laws which conflict with ERISA but all state laws related to employee benefit plans. The reasons for broad preemption of state laws under ERISA were succinctly stated by Senator Jarvis, a major sponsor and floor manager of the bill, during final consideration:
>
> > Both House and Senate bills provided for preemption of State law but—with one major exception appearing in the House

> bill—defined the perimeters of preemption in relation to the area regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974).

Although the Illinois Act expressly exempts active trusts from coverage under its provisions, inactive trusts are not exempted. The Department of Labor has previously taken the position that employee benefit plan trusts which are merely awaiting future distribution to participants/beneficiaries are covered as employee benefit plans within the meaning of ERISA.

Therefore, it is the position of the Department of Labor that the Illinois Act is preempted under ERISA section 514. Further, it is the Department's position that § 514(b)(2)(A) [which addresses state laws regulating insurance,

banking, or securities] is inapplicable in regard to the Illinois Act . . . .

III. Discussion

A. Standard for A Motion For Summary Judgment

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of the adverse party's pleading"; rather, it must respond with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Valenti v. Qualex, Inc.*, 970 F.2d 363, 365 (7th Cir. 1992), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court should grant a motion for summary judgment only when the record shows that a reasonable jury could not find for the nonmoving party. *Valenti v. Qualex, Inc.*, 970 F.2d at 365; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

B. Does ERISA Preempt Illinois' Escheat Statute?

Three reported cases, all involving ERISA welfare plans, rather than pension plans, address whether ERISA preempts a state escheat statute. See *Aetna Life*

Ins. v. Borges, 869 F.2d 142 (2d Cir.), *cert. denied,* 493 U.S. 811 (1989) (ERISA does not preempt Connecticut's escheat law); *Blue Cross and Blue Shield of Florida v. Department of Banking and Finance*, 791 F.2d 1501 (11th Cir. 1986) (ERISA preempts Florida's escheat statute); *Attorney General v. Blue Cross and Blue Shield of Michigan*, 168 Mich. App. 372, 424 N.W. 54 (Mich. App. 1988) (ERISA does not preempt Michigan's escheat law). The court will provide a brief overview of preemption principles, summarize these cases, and then turn to the parties' arguments.

1. General Preemption Principles

Section 514(a) of ERISA provides that:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a).

ERISA's preemption provision is "deliberately expansive" and was "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987), *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Courts considering preemption focus on the interpretation of only two words in the preemption provision—whether or not a state statute "relates to" ERISA. The Supreme Court instructs us to read these words broadly, as ERISA's reach is not limited to state

laws specifically designed to affect employee benefit or welfare plans or to state laws meant to address ERISA matters such as reporting, disclosure, and fiduciary responsibilities. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

On the other hand, the Supreme Court has also stated that, when Congress drafted the ERISA's pre-emption language, it did not intend to preempt all laws that "relate to" an ERISA plan in only a small or tangential way. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n. 21. Instead, it-intended to preempt any law that "has a connection with or reference to [a covered employee benefit plan]." *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832, 837 (1997). Preemption is meant to ensure that a single set of regulations will govern the administrative practices of an ERISA plan, as opposed to a patchwork of potentially inconsistent state laws. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (in enacting § 514(a), Congress sought to ensure a uniform body of benefits law and to avoid conflicts between federal and state laws which could work to the detriment of plan beneficiaries); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

In order to further this purpose, state statutes must affect an ERISA plan in a meaningful way to "relate to" ERISA—state laws that only have a "tenuous, remote, or peripheral" effect on a plan do not rise to the level of relatedness necessary to support a finding of preemption. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21. Thus, claims that affect the structuring of ERISA plans or claims that purport to determine the substan-

tive rights and duties among the parties who created and administer the plan are preempted. *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995). Similarly, rules governing payment to plan participants necessarily "relate to" ERISA pension and welfare plans. *Dranchak v. Akzo Nobel, Inc.*, 88 F.3d 457, 459 (7th Cir. 1996).

In addition, ERISA preempts claims which interfere with a plan's administration, even where plan beneficiaries do not assert the state law claims. For example, in *Plumber's Pension Fund, Local 130 v. Niedrich*, 891 F.2d 1297 (7th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990), the Seventh Circuit held that ERISA preempted Illinois law addressing the personal liability of corporate officers and thus barred a suit based on that state law seeking to hold the corporate officers personally liable for delinquent pension contributions. *Accord First Nat'l Life Ins. Co. v. Sunshine Jr. Food Stores, Inc.*, 960 F.2d 1546 (11th Cir. 1992) (ERISA barred insurer's suit against employer alleging that the employer breached its obligations under a group policy that funded an ERISA plan), *cert. denied*, 506 U.S. 1079 (1993). *See also California Division of Labor Standards Enforcement v. Dillingham, Construction*, 117 S. Ct. at 837 (collecting cases finding preemption).

In considering the reach of the phrase "relate to" in ERISA, the Eighth Circuit's comprehensive, although slightly dated, survey is quite helpful. *See Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1344 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992). Specifically, when considering whether ERISA preempted Arkansas' assignment statute, the Eighth Circuit stated that courts:

> . . . have relied on a variety of factors when determining whether a state statute of general application "relates to" ERISA plans. [footnote omitted]. These factors include whether the state law negates an ERISA plan provision, *Baxter v. Lynn*, 886 F.2d 182, 185 (8th Cir. 1989), whether the state law affects relations between primary ERISA entities, *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987); *Sommers Drug Stores v. Corrigan Enters.*, 793 F.2d 1456, 1467 (5th Cir. 1986), whether the state law impacts the structure of ERISA plans, *United Food & Commercial Workers v. Pacyga*, 801 F.2d 1157, 1160 (9th Cir. 1986), whether the state law impacts the administration of ERISA plans, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987), whether the state law has an economic impact on ERISA plans, *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 147-48 (2d Cir. 1989), whether preemption of the state law is consistent with other ERISA provisions, *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 832-40 (1988), and whether the state law is an exercise of traditional state power, *Aetna Life Ins. Co.*, 869 F.2d at 148; *Firestone Tire & Rubber Co.*, 810 F.2d at 555.

947 F.2d at 1344.

The Eighth Circuit then explained that "all these factors can be relevant to an ERISA preemption analysis. Like any list of factors, however, they only serve to focus and clarify the court's analysis. The court must still look to the totality of the state statute's impact on the plan—both how many of the factors favor preemption and how heavily each individual factor favors

preemption are relevant." *Id.* The court then concluded that, although no one factor was determinative of the ERISA preemption issue, the aggregate of the factors militated in favor of a finding that Arkansas' assignment statute "related to" ERISA welfare benefit plans and thus was preempted. *Id.* at 1344-45.

No Seventh Circuit authority addresses whether a state law controlling unclaimed property held by a an ERISA fund "relates to" ERISA. Accordingly, this suit lies in the netherworld between clearly preempted suits which implicate the interpretation or administration of an ERISA plan, and suits that merely address the relationships among parties incidental to the administration of beneficiaries' rights under a plan. *See Fox, Curtis & Associates, Inc. v. Employee Benefit Plans, Inc.*, No. 92 C 5828, 1993 WL 265474 *4 (N.D. Ill. Jul. 13, 1993). Thus, the court turns to the decisions of other courts addressing this issue for assistance in determining whether ERISA preempts Illinois' escheat law.

ii. Cases Addressing Preemption of Escheat Statutes

In *Aetna Life Ins. v. Borges*, the Second Circuit held that ERISA does not preempt Connecticut's escheat law as it applies to uncollected drafts for employee benefits. *Aetna Life Ins. v. Borges*, 869 F.2d 142 (2d Cir. 1989). The Borges court, however, was confronted with a dispute about entitlement to monies held in reserve by the plaintiff insurance company, rather than ERISA plan assets. In a thorough opinion, the Second Circuit noted that ERISA preemption is triggered by a state law's

effect on a plan's primary administrative functions, such as determining an employee's eligibility for a benefit and the amount of the benefit, rather than an indirect effect on administrative procedures.

According to the Second Circuit, ERISA preempts state laws that provide an alternative cause of action to employees to collect ERISA benefits, refer specifically to ERISA plans or apply solely to such plans, or interfere with the calculation of benefits owed to employees. *Id.* at 146. It does not, however, preempt laws of general application which have only an indirect effect on an ERISA plan. *Id.* at 146-47. Applying these principles to Connecticut's escheat law, the Second Circuit concluded that ERISA did not require a finding of preemption. First, the Second Circuit explained that the escheat law applies generally to lost or abandoned property, and does not focus specifically on ERISA plans or benefits. *Id.* at 147. It also noted that escheat of abandoned property is an area of traditional state authority and thus should not be preempted by federal law unless that conclusion is unavoidable. *Id.*

Finally, it acknowledged that the escheat law would impact ERISA plans both economically and administratively, because: (1) the insurance company would have to include the value of escheated claims in the experience rating of employers, which would likely lead to some combination of higher premiums for employers, lower benefits for employees, lower profits for the insurer administering the plan; (2) it would affect relations with principal ERISA entities as beneficiaries would have to seek payment from the State rather than the insurer after the initial escheat period had passed;

and (3) it would burden beneficiaries, as collecting benefits from the State would be more difficult than presenting an uncollected draft to the insurer.

Nevertheless, analogizing escheated claims to garnishment laws, the Second Circuit concluded that the effects of the escheat law were too insubstantial to persuade the court that Congress meant to preempt it. Specifically, the court noted that the law's impact was far less than a state garnishment statute, which allows a creditor to seize benefits immediately, as it only affected benefits unclaimed for many years. It also noted that escheat laws present no greater threat of inconsistency among state laws than does garnishment. *Id.* at 147-48. In addition, it stated that the procedures for collecting previously unclaimed benefits from the State were not so much more complex than collecting a draft more than three years old. *Id.* at 148. Finally, the Second Circuit rejected the insurer's argument that the escheat law provided beneficiaries with an alternative cause of action of recovering benefits, explaining that it affects the method by which certain beneficiaries may collect drafts, rather than the issuance of the drafts in the first instance. *Id.* at 148-49.

In *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking and Finance*, 791 F.2d 1501 (11th Cir. 1986), the Eleventh Circuit held that ERISA preempted Florida's unclaimed property act because Florida's law conflicted with a provision in Blue Cross' federal health benefit program regarding the disposition of unclaimed benefits. Specifically, the government's contract with Blue Cross specified that uncashed benefit checks over two years old shall be voided and cred-

ited to the plan's reserve fund for the net excess of premium payments over claims and expenses. In *Blue Cross & Blue Shield of Florida*, the court declined to independently determine whether the state escheat law was related to the ERISA plan. Instead, it opted to defer to the conclusion of the agency charged with administering Blue Cross' ERISA program that ERISA preempted the escheat law.

Specifically, the Eleventh Circuit reasoned that, to sustain the agency's position, it "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Id.* at 1506, *citing Unemployment Compensation Commission of Alaska v. Aragon*, 329 U.S. 143, 153 (1946). Concluding that the agency's position was reasonable (and that the opposite conclusion might also be reasonable), the Eleventh Circuit deferred to the agency and found that ERISA preempted Florida's escheat statute.

Finally, in *Attorney General v. Blue Cross & Blue Shield of Michigan*, 168 Mich. App. 372, 424 N.W.2d 54 (Mich. App. 1988), the Michigan Appellate court held that ERISA did not preempt the application of Michigan's escheat law to an ERISA fund. The *Blue Cross & Blue Shield of Michigan* court, like the *Borges* court, was confronted with a dispute about entitlement to monies held in reserve by the plaintiff insurance company, rather than ERISA plan assets. The court considered whether the state law: (1) represented a traditional exercise of state authority; (2) affected relations among principal ERISA entities and an outside party or between two outside parties with only an incidental

effect on the plan; and (3) affected ERISA plans in a non-incidental way. *Id.* 168 Mich. App. at 382, 424 N.W.2d at 58. The court then concluded that the state escheat law was not preempted, largely because the state escheat law was a statute of general application that affected the defendant in its capacity as a holder of abandoned property, not its capacity as an ERISA entity and because the escheat law did not affect the structure, administration, or types of benefits provided under the ERISA plan. *Id.*

3. Illinois' Escheat Statute

Determining whether Illinois' escheat statute "relates to" an ERISA plan is difficult, as the preemption provision is "unhelpful," *California Division of Labor Standards Enforcement v. Dillingham, Construction*, 117 S. Ct. 832, 837 (1997), and there are pros and cons to each side's position. As noted above, however, the United States Department of Labor has issued an advisory opinion that specifically addresses ERISA's impact on the IUPA and concludes that the IUPA is preempted. U.S. Dept. of Labor Advisory Opinion 78-32A (1978). In addition, the Secretary of Labor has filed an amicus curiae brief supporting the plaintiff's view that the ERISA preempts the IUPA.

The United States Department of Labor is the federal agency charged with administering and enforcing ERISA, and has the authority to render authoritative interpretations of ERISA. 29 U.S.C. § 1132(a)(2); *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997); *see generally* 29 U.S.C. §§ 1331-1145. As such, its interpretation of ERISA, while not conclu-

sive, is entitled to "great deference." *Blue Cross & Blue Shield of Florida v. Dep't of Banking & Finance*, 791 F.2d at 1506, *quoting Udall v. Tallman*, 380 U.S. 1 (1965).

In other words, the well-known standard set forth in *Chevron, U.S.A. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), applies. Under *Chevron*, a court does not search for what is, in the court's view, the best possible construction of a statute. *Herman v. Nationsbank Trust Co.*, 126 F.3d at 1363. Instead, if a "statute is ambiguous with respect to the specific issue, the question for the courts is whether the agency's answer is based on a permissible construction of the statute." *Huppeler v. Oscar Mayer Foods Corp.*, 32 F.3d 245, 251-52 (7th Cir. 1994), *citing Chevron*, 467 U.S. at 843.

Thus, the Supreme Court instructs that, if an agency interpretation does not do violence to the purpose and wording of the regulation or otherwise cross into forbidden terrain, courts should defer to it. *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150 (1991). The fact that the agency's opinion is reflected in litigation documents (i.e., an amicus brief) and an opinion letter, rather than a formal regulation, does not render it meaningless. Agency opinions that are not embodied in formal regulations promulgated by the Secretary are nevertheless entitled to deference. *See, e.g., Herman v. Nationsbank Trust Co.*, 126 F.3d at 1363 (collecting cases).

The court will, therefore, defer to the Secretary's position regarding the IUPA if that position is reasonable. *Blue Cross and Blue Shield of Florida v. Dep't of*

Revenue and Finance, 791 F.2d at 1506 (holding that the federal Office of Personnel Management's interpretation of a federal health benefits contract was reasonable and that ERISA thus preempted Florida's Unclaimed Property Act). In making this determination, the court looks to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive . . . as well as to the nature of the effect of the state law on ERISA plans." *California Division of Labor Standards Enforcement v. Dillingham*, 117 S. Ct. at 838, *quoting New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995).

The following reasons support the agency's interpretation. First, as discussed more fully above, the "relate to" language in § 514(a) has a broad reach and, if the IUPA is not preempted, it would reach and capture plan benefits. This impact on an ERISA plan is more than tenuous and remote and thus falls within the ambit of § 514(a). Second, ERISA's preemption provision was meant to prevent a patchwork of state laws affecting benefits. If the IUPA (and other state's unclaimed property laws) reach unclaimed pension benefits, this goal would be subverted. Third, under the defendant's interpretation of ERISA, the IUPA reaches plan assets and imposes its own set of procedures upon plan beneficiaries or participants seeking to claim those benefits. This affects plan administration and overrides ERISA's regulations affecting plan benefits.

Although the defendants and amicus the National Association of Unclaimed Property Administrators raise a number of well-reasoned arguments in opposition,

this court's task is not to divine the best possible interrelation between ERISA and the IUPA. As the Eleventh Circuit remarked when concluding that ERISA preempted Florida's Unclaimed Property Act, "although the opposite conclusion might also be reasonable, [the agency's] determination is entitled to deference" if it also is reasonable. *Blue Cross and Blue Shield of Florida v. Dep't of Revenue and Finance*, 791 F.2d at 1506. Because the agency's position here is reasonable, the plaintiffs are entitled to summary judgment.

IV. Conclusion

For the above reasons, the plaintiffs' motion for summary judgment [15-1] is granted and, the defendant's cross-motion for summary judgment [19-1] is denied. The court commends counsel for their thoroughly researched and well-written briefs and thanks the amicus for providing the court with their views on the novel and important issue presented by this case.

DATE: MAY 8 1998

Blanche M. Manning
United States District Court Judge

United States District Court
Northern District of Illinois
Eastern Division

JUDGMENT IN A CIVIL CASE

ComEd

v. Case Number: 97 C 6

Casillas

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by the Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment (#15-1) is granted and, the defendant's cross-motion for summary judgment (#19-1) is denied.

Michael W. Dobbins,
Clerk of Court

Date: 5/11/1998

Christopher A. Lavizzo,
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 11 1999
OFFICE OF THE CLERK

No. 99-102

In The

Supreme Court of the United States

JUDY BAAR TOPINKA, STATE TREASURER, STATE OF ILLINOIS,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY and TRUSTEES OF THE COMMONWEALTH EDISON COMPANY SERVICE ANNUITY FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE, THE STATES OF IOWA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, OKLAHOMA, COMMONWEALTH OF PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, AND COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The decision of the Seventh Circuit Court of Appeals, holding that ERISA preempts Illinois' unclaimed property act as to obligations represented by unclaimed pension benefit checks, implicates the unclaimed property laws of the *amici* States. There is no substantive difference between the Illinois statutory provision and that of other States concerning the State's custodial taking of unclaimed property held by an ERISA fiduciary. Almost all of the States have enacted unclaimed property legislation promulgated by the National Conference of Commissioners on Uniform State Laws, either the Uniform Disposition of Unclaimed Property Act (as in Illinois), the Uniform Unclaimed Property Act (1981), or the Uniform Unclaimed Property Act (1995). *See* 1 David J. Epstein, *et al., Unclaimed Property Law and Reporting Forms*, § 5.21[3] (1999). The substance of those laws as applied to unclaimed pension payments is that those obligations would be presumed abandoned and must be delivered into the protective custody of the State if the apparent owner has not communicated or otherwise indicated an interest in the pension payment within the prescribed abandonment period.[1]

Thus, the decision of the Seventh Circuit now calls into question the validity of all State unclaimed property

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[1] *See* Unif. Disposition of Unclaimed Property Act (1954) §§ 7 and 9, 8A U.L.A. 283, 286 (1993); Unif. Disposition of Unclaimed Property Act (1966) §§ 7 and 9, 8A U.L.A. 232, 235 (1993); Unif. Unclaimed Property Act (1981) §§ 2 and 12, 8B U.L.A. 595, 622 (1993); and Unif. Unclaimed Property Act (1995) §§ 2(14) and (15), 8B U.L.A. 100 (Supp. 1999).

laws throughout the United States when applied to uncashed pension benefits held by an ERISA fiduciary. This decision adversely affects the ability of State unclaimed property administrators throughout the United States to search for the missing owners of unclaimed pension benefits and to take custody of these obligations so as to safeguard the rights of the State's citizenry in those benefits, just as the State uniformly does for all other types of unclaimed property. Considering that in 1993 private pension plans held assets exceeding $2.3 trillion and that those assets probably have appreciated substantially in the past few years, even if a very small fraction of those pension funds produced unclaimed benefit payments, those unclaimed obligations would run into the millions of dollars. The Seventh Circuit decision then frustrates the accomplishment of the States' policy and ability to safeguard the interests of its retirees to receive lost or forgotten benefit payments that are due from ERISA fiduciaries to the States' citizens. By doing so, the decision nullifies a long-established State process that is the most meaningful, effective, and successful mechanism for locating owners of unclaimed property.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

In addition to the reasons presented by the Petitioner, the State Treasurer of Illinois, in her Petition for Certiorari, there are two further reasons why the Writ should be granted. First, the decision of the Seventh Circuit Court of Appeals failed to apply two well-established

rules of law that are integral to federalism and to the proper respect for the States' Tenth Amendment reserved power over the disposition of unclaimed property in the best interests of its citizenry. ERISA makes no mention of what disposition is to be made of pension checks that are uncashed after issuance; generally-applicable State unclaimed property laws do. The Seventh Circuit then was required to apply that State law in the absence of any federal provision and to harmonize the federal and State interest. It did neither. Instead, with clear disdain for State unclaimed property law, the Seventh Circuit crafted a novel concept of the interest value of unclaimed funds as justification to evade that State law. The Seventh Circuit substituted its novel concept for the State policy in favor of the location of missing owners of unclaimed property. By doing so, the Seventh Circuit disserves the citizenry by nullifying an accepted, widely-known State process followed through the United States for all forms of unclaimed property, whereby the missing owners of unclaimed property are located and unclaimed property is returned to them. The Seventh Circuit decision makes it much more difficult, if not impossible, for citizens to learn about and reclaim those payments due them from an ERISA fiduciary, because the States would not be the source for information about uncashed pension payments due to its citizenry.

Second, by holding that ERISA preempts State unclaimed property law, the decision of the Seventh Circuit Court of Appeals below unsettles an area of substantive law traditionally regulated by the States in the absence of any federal law or policy that addresses the disposition of such unpaid pension obligations. It directly

conflicts with a decision of the Second Circuit Court of Appeals, which judiciously and conscientiously examined the issue and held that ERISA does not preempt a State unclaimed property law as applied to uncollected drafts for employee benefits. The Second Circuit's explication of the governing legal principles and its rationale for its holding have been recognized and followed by numerous other federal courts in preemption cases arising in various contexts. Considering the decision of the Second Circuit and all of the other courts that have expressed approval of the Second Circuit's rationale, it is reasonable to conclude that ERISA does not preempt State unclaimed property laws. The contrary decision of the Seventh Circuit is irreconcilable with that of the Second Circuit. It now creates confusion and uncertainty in this area of substantive law, requiring a definitive decision from the Supreme Court.

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit Decision Violates State Sovereignty Over the Disposition of Unclaimed Property By Failing to Apply State Unclaimed Property Law to a Matter Unaddressed By Federal Law and By Making No Attempt to Harmonize Federal and State Laws Before Holding the State Law Preempted

While a federal statute, duly enacted pursuant to a grant of powers to the federal government in the Constitution, is the supreme law of the United States, federalism requires that before a federal statute is interpreted to displace traditional State regulation, Congress make an

unmistakably clear legislative statement of its intent to do so. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "[W]here the intent to override [State law] is doubtful, our federal system demands deference to long-established traditions of state regulation." *Id.*, at 546.

From the powers reserved to them under the Tenth Amendment, the States have enacted a comprehensive process for the handling of property presumed abandoned. As the Supreme Court has explained, "States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware v. New York*, 507 U.S. 490, 497 (1993). The Court has recognized that the state's interest in unclaimed property is "as old as the common law itself." *Anderson National Bank v. Luckett*, 321 U.S. 233, 251 (1944). Unclaimed property legislation actualizes "the power of the States to care for the safety of the property of their peoples by such legislation as [the States] deemed appropriate." *Reid v. Colorado*, 187 U.S. 137, 148 (1902). By means of such legislation, the State seeks "to protect the interests of [missing or lost owners] from the risks which attend long neglected accounts." *Anderson National Bank, supra*, at 241. Such legislation embodies the States' public policy in favor of locating and delivering the unclaimed property to the rightful owner, property that may have "remained unclaimed through no fault or lack of diligence on the part of the rightful owners." *State v. Federated Dept. Stores, Inc.*, 175 B.R. 924, 930 (S.D. Ohio 1992).

ERISA is a comprehensive and reticulated statute, enormously complex and detailed. *Hughes Aircraft Co. v. Jacobsen*, 119 S.Ct. 755, 764 (1999). But it does not address

the disposition of unclaimed pension payments issued by an on-going ERISA plan; "[t]he statute does not prescribe any particular procedure for the handling of benefits that are awarded but uncollected, nor does it specify a time limit for honoring such claims." *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 144 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

Where, as here, an ERISA fiduciary challenges the application of a State's general unclaimed property law to unclaimed pension payments, a federal court, mindful of the importance of federalism, has an obligation to follow two rules of law mandated by the Supreme Court. One, while a federal court may not contradict an explicit federal statutory provision, neither can it "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). And two, because "ERISA leaves room for complementary or dual federal and state regulation," a federal court must seek to harmonize or accommodate the federal and State regimes before calling for federal supremacy. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 98 (1993). With quite apparent disdain for State unclaimed property laws, the Seventh Circuit below ignored both of these rules of law.

Underlying the Seventh Circuit decision is the view that the crux of the litigation between the ERISA fiduciary and the State was "who gets to keep the interest" that might be earned on the money to be used to pay the unclaimed pension benefits. *Commonwealth Edison Co. v.*

Vega, 174 F.3d 870, 873 (7th Cir. 1999). But the Commonwealth Edison plan documents made no provision for the payment of any interest on uncashed benefit payments. *Id.* Nowhere in its discussion about the interest value did the Seventh Circuit mention any relevant Congressional intent to enrich the pension fund with unclaimed funds owing to missing plan participants, nor did it cite to any authority that Congress ever contemplated such a matter. Interest value itself provides no principled basis for finding preemption because it is uncertain and speculative; money invested may lose value just as much as it might gain value. Further, in other preemption contexts, the Supreme Court has rejected the "more money" for the fund arguments. *O'Melveny & Myers, supra*, at 88.

Moreover, the Seventh Circuit is wrong in basing its interest value rationale on the assertion that State unclaimed property laws do not provide for the payment of interest to a previously-missing owner. *Commonwealth Edison Co., supra*, at 872; *but see*, for example, Unif. Unclaimed Property Act (1981) § 24(c), 8B U.L.A. 655 (1993). The unclaimed property law of twenty-three States makes provision for the payment of interest; nineteen States provide for interest on all kinds of unclaimed property and four States limit interest to certain kinds.[2]

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[2] Alaska (Alaska Stat. § 34.45.380(d) (Lexis 1998)), Arkansas (Ark. Code Ann. § 18-28-220(b) (Lexis Supp. 1997)), California (Cal. Civ. Proc. Code § 1540(c) (West 1982)), Colorado (Colo. Rev. Stat. Ann. § 38-13-117(3)(a) (West Supp. 1998)), Connecticut (Conn. Gen. Stat. Ann. § 3-70a(d) (West Supp. 1999)), Idaho (Idaho Code § 14-524(3) (1999), Louisiana (La. Rev. Stat. Ann. § 9:193 (West. Supp. 1999)), Maine (Me. Rev. Stat. Ann. tit.33, § 1962 (West 1999)), Maryland (Md. Code Ann. Com.

The underlying rationale of the Seventh Circuit about the interest value would then be inapplicable in these States. Nonetheless, the Seventh Circuit decision, by casting a cloud on the laws of these States, only fosters further litigation to determine what effect, if any, it has as persuasive authority for ERISA preemption in these jurisdictions.

The interest value argument overlooks the real and important basis for State unclaimed property law, the obligation of the State to search for the missing owner and to deliver to that owner the property or funds to which the owner is lawfully entitled. The real issue in this case is not whether ERISA preempts State law so that an ERISA plan gets to keep the interest value of monies due to missing beneficiaries, but whether ERISA preempts a State law that mandates search procedures for locating the missing beneficiaries. While the Seventh Circuit believed it to be more important to insure that a missing beneficiary's monies remained unclaimed so that those

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Law § 17-314 (1994)), Massachusetts (Mass. Ann. Laws. ch. 200A, § 10(e) (Law. Co-op. 1994)), Michigan (Mich. Stat. Ann. § 26.1055(25)(3) (Lexis 1999 Supp.)), Mississippi (Miss. Code Ann. § 89-12-39(3) (Supp. 1998)), Missouri (Mo. Ann. Stat. § 447.565(2) (West Supp. 1999)), New Jersey (N.J. Stat. Ann. § 46:30B-79 (West 1989)), New Mexico (N.M. Stat. Ann. § 7-8A-11 (Lexis 1998)), New York (N.Y. Aband. Prop. Law § 1405 (McKinney 1991)), Rhode Island (R.I. Gen. Laws § 33-21.1-24(c) (1995)), South Carolina (S.C. Code Ann. § 27-18-250(c) (1991)), Tennessee (Tenn. Code Ann. § 66-29-117(b) (1993)), Virginia (Va. Code Ann. § 55-210-21(c) (Lexis 1995)), Washington (Wash. Rev. Code Ann. § 63.29.240(3) (West 1997)), West Virginia (W.Va. Code § 36-8-11(2) (1997)), and Wisconsin (Wis. Stat. Ann. § 117.24(3) (West 1997)).

monies could be enjoyed by others, State unclaimed property laws place importance on efforts to insure that the beneficiary is located and paid.

State unclaimed property programs are remarkably successful in locating missing owners of unclaimed property delivered into the protective custody of the State. Illinois' unclaimed property act, like that of all of the other States, provides for wide-spread publication of the names of missing owners. *People ex rel. Callahan v. Marshall Field & Co.*, 404 N.E.2d 368, 369 (Ill. App. Ct. 1980). As explained by the Oregon Supreme Court, "[p]rovision is made for publication of notice for the purpose of finding the true owner of the property and for the owner to redeem it by a comparatively simple process." *State ex rel. Mallicoat v. Coe*, 460 P.2d 357, 358 (Or. 1969). Consistent with their statutory obligations to the missing owner, States also use other locating efforts, including researching national databases to find a change-of-address; matching unclaimed property information with data on State motor vehicle and income tax records to locate a more current address; maintaining searchable databases of unclaimed property records on the Internet; operating outreach programs at State and county fairs, shopping malls, and senior citizen centers to inform about the State program and to assist in searching the State's records; distributing unclaimed property owner listings to local legislators and officials; and conducting individual investigations to trace a missing owner. Thus, State unclaimed property laws provide the most meaningful and effective mechanism to locate the missing beneficiary entitled to an unclaimed pension payment.

ERISA contains no provision requiring an ERISA fiduciary to attempt to locate a missing participant who has failed to cash a benefit payment check. In this case, the record does not show that the Commonwealth Edison fiduciaries took any steps to locate beneficiaries who had not cashed their benefit payments. The record shows that Commonwealth Edison simply wrote-off these outstanding checks. Because ERISA is silent as to the disposition of unclaimed pension benefits in these circumstances, State unclaimed property laws can be readily harmonized with the federal statute. The search efforts made by States under unclaimed property laws essentially pick up where ERISA leaves off.

Further demonstrating the mesh of federal and State law in this area of unclaimed property is a recent amendment of ERISA that addresses the disposition of benefits due to beneficiaries that cannot be located when a single employer plan terminates. The Retirement Income Protection Act of 1994 added a new section that requires a terminating pension plan to transfer the benefits due to a missing participant to the Pension Benefit Guaranty Corporation or purchase from an insurance company an irrevocable commitment to pay the benefits. P.L. 103-465, § 776, 103 Stat. 5047, 29 U.S.C. § 1350. This provision addresses a situation that is not covered by State unclaimed property laws. State law raises a presumption of abandonment upon expiration of a period of years after property is payable or distributable. It cannot govern the disposition of property that is unclaimed immediately following a plan's termination, but before the abandonment period expires.

At the same time, it is significant that in 1994 Congress chose to legislate regarding unclaimed benefits only where State law cannot govern, while leaving untouched the prevailing law that ERISA does not preempt State unclaimed property law as held by the Second Circuit in *Aetna Life, supra,* in 1989. As has been stated by the Third Circuit Court of Appeals, where Congress acts upon a federal statute, it is presumed that "Congress is aware of existing judicial interpretations of statutes." *Scheidemann v. I.N.S.*, 83 F.3d 1517, 1525 (3rd Cir. 1996). At the time of the enactment of the Retirement Income Protection Act of 1994, Congress then is presumed to have been aware of the *Aetna Life* decision. Because Congress chose only to address an unclaimed property situation not addressed by State law, the Second Circuit's decision stands as harmonious with the congressional intent.

By ignoring State sovereignty and the constraints of federalism, and by failing to apply State unclaimed property laws in a situation not governed by federal law, the Seventh Circuit has itself crafted an exception to what otherwise was a unitary scheme followed throughout the United States for the handling of all forms of unclaimed property. In doing so, the Court disserves the States' citizens. Through the publicity attending unclaimed property programs and the States' own outreach efforts, the citizenry is now well aware that the States serve to protect the citizens' interest in abandoned or unclaimed property, and that the citizen can always look to the States as the source for information about property due to the citizen. The Seventh Circuit decision nullifies this State program. It leaves plan participants or beneficiaries with no ready resource to locate uncashed payments of

which they may be unaware and thus have no way of knowing where to look. In place of an effective State program, the Seventh Circuit's decision only crafts for an ERISA plan "a charmed existence never contemplated by Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

II

The Decision of the Seventh Circuit Court of Appeals Upsets the Widely-Accepted Holding that ERISA Does Not Preempt State Unclaimed Property Laws, Based Upon the Decision of the Second Circuit Court of Appeals in *Aetna Life Insurance Co. v. Borges*

Aetna Life Insurance Co. v. Borges, 869 F.2d at 149, was a case involving ERISA preemption of a Connecticut unclaimed property provision that is not materially different from that of Illinois. Starting with the presumption that the historic police powers of the State are not preempted unless Congress makes clear and manifest its intention to do so, and after considering all aspects of the effect of State unclaimed property laws upon an ERISA plan, the Second Circuit held that "ERISA does not preempt Connecticut's escheat law as it applies to uncollected drafts for employee benefits." It concluded that "[a]bsent more specific direction from Congress, [the Court] can safely assume that Congress did not intend to create [for ERISA plans] an exception to this traditional exercise of state authority." *Id.*, at 147-48.

The Circuit Courts of Appeals, in cases involving ERISA preemption in various contexts, have acknowledged the persuasiveness of the explication of the rules of law and the rationale of the Second Circuit concerning

ERISA preemption of State unclaimed property laws; for example,

- First Circuit: This Circuit Court stated that in *Aetna Life* the Second Circuit found that a State escheat law did not "relate to" ERISA plans and noted that ERISA does not preempt many laws that have a minimal, indirect impact on plan administration. *Combined Management, Inc. v. Superintendent of Bureau of Insurance*, 22 F.3d 1, 7 (1st Cir. 1994).

- Fourth Circuit: This Circuit Court explained that in *Aetna Life*, the Second Circuit held that "state escheat law [was] not preempted," and cited it for the proposition that run-of-the-mill State law claims are not preempted even though such claims obviously affect and involve an ERISA plan and its trustees. *Custer v. Sweeney*, 89 F.3d 1156, 1166 (4th Cir. 1996).

- Fifth Circuit: This Circuit Court explained that the holding in *Aetna Life* was that "ERISA does not preempt application of state escheat law to benefit checks and drafts." *Matter of Dyke*, 943 F.2d 1435, 1447 (5th Cir. 1991).

- Sixth Circuit: This Circuit Court explained that in *Aetna Life*, the Second Circuit held that "Connecticut's escheat law was not preempted by ERISA because it had no effect on the employer's 'original determination of an employee's eligibility for benefits,'. . . . " *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 341 (6th Cir. 1993).

- Eighth Circuit: This Circuit Court commented that in *Aetna Life*, the Second Circuit

"found that state [escheat] statutes affecting benefit distribution did not 'relate to' ERISA plans." *Boyle v. Anderson*, 68 F.3d 1093, 1104 (8th Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996).

- Ninth Circuit: This Circuit Court stated that in *Aetna Life*, the Second Circuit held that "ERISA does not preempt state escheat law of abandoned property as it applies to uncollected drafts for employee benefits." *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1504 (9th Cir. 1993).

- Tenth Circuit: This Circuit Court cited *Aetna Life* as "upholding general escheat law that affected ERISA benefit plans." *National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555, 1558 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992).

Similarly, other federal courts have indicated their understanding that ERISA does not preempt State unclaimed property laws. For example, a Third Circuit district court explained that in *Aetna Life*, "Connecticut's escheat law applied to all types of abandoned property, and it was insignificant that the abandoned property in th[at] particular case consisted of the benefits provided under a plan covered by ERISA." *United Wire, etc. v. Morristown General Hospital*, 793 F.Supp. 524, 534 (D.N.J. 1992), *rev'd*, 995 F.2d 1179 (3rd Cir.), *cert. denied*, 510 U.S. 944 (1993). And an Ohio district court explained that in *Aetna Life*, the Second Circuit "held that the indirect economic and administrative effects that state abandoned property laws may have on an employee benefit plan are not substantial enough to give rise to preemption by ERISA." *State v. Federated Dept. Stores, Inc., supra*, at 929.

The totality of all of these cases demonstrates that it was understood that ERISA does not preempt State abandoned or unclaimed property laws (custody laws), not just absolute escheat laws (as explained in Illinois' Petition herein), and not just as to employee welfare plans. In accord with this understanding, in promulgating the 1995 Uniform Unclaimed Property Law, the Conference of Commissioners on Uniform State laws, relying on *Aetna Life*, commented that the 1995 Uniform Unclaimed Property Act "presumes that [a State unclaimed property act] is not preempted by ERISA." Unif. Unclaimed Property Act (1995) § 2 cmt, 8B U.L.A. 101 (Supp. 1999). Thus, the Seventh Circuit decision below stands as the only instance where a court has held that the ERISA preempts State unclaimed property laws.

Additionally, the persuasive authority of *Aetna Life* cannot validly be undercut by asserting that it involved (1) insurance reserve funds, not pension assets, and (2) welfare benefit plans, not pension plans subject to ERISA's anti-alienation provision. Both are distinctions without substantive difference as to the preemption analysis.

The concern for plan assets derives from ERISA's exclusive benefit provision, which requires that assets "shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). As the Eighth Circuit Court of Appeals has found, "[t]he ERISA exclusive benefit provision does not prohibit every indirect benefit to people other than plan beneficiaries." *Boyle v. Anderson, supra*, at 1103. The congressional intent was

to make the law of trusts applicable to ERISA plans and to eliminate such abuses as self-dealing, imprudent investing, and misappropriation of funds. *Id.*, at 1102. In accord, the Tenth Circuit Court of Appeals has found that "[t]he anti-inurement or 'exclusive benefit' policy of section 403(c) of ERISA is intended to 'protect participants' expected payments' by preventing employers from diverting funds to themselves." *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995), quoting *Outzen v. FDIC*, 948 F.2d 1184, 1188 (10th Cir. 1991). Congress "was not concerned with whether persons not covered by ERISA plans were somehow benefited by the operation of the plans." *Boyle v. Anderson, supra*, at 1102. Thus, any argument that compliance with unclaimed property laws would constitute the use of plan assets other than for the exclusive benefit of participants "stretches ERISA's exclusive benefit provision beyond the boundaries intended by Congress." *Id.*

Neither does the anti-alienation provision for pension funds provide a meaningful distinction undermining the authoritativeness of the *Aetna Life* decision. That provision only requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). As the Second Circuit Court of Appeals has found, "[t]he purpose of the proscription on alienation and assignment is to protect an employee from his own financial improvidence in dealings with third persons." *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 124 (2d Cir. 1979). The anti-alienation provision shields only "the beneficiaries' interest under the pension plan from third-party creditors." *Coar v. Kazimir*, 990 F.2d 1413,

1421 (3d Cir.), *cert. denied*, 510 U.S. 862 (1993). In contrast, the Eighth Circuit Court of Appeals has also found that "state garnishment and escheat statutes do not shift control over benefit distribution" and "[n]either do they negate a proper ERISA provision." *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341, 1347 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992). Thus, Congress did not intend for ERISA to preempt a State law that assures to plan participants payment of the very benefits that ERISA prevents from being assigned or alienated.

Furthermore, in the unclaimed property law context, the Supreme Court itself has described the State's role as that of "a conservator" of a missing person's property. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948); *Anderson National Bank, supra*, at 241. Undoubtedly, no one would reasonably argue that ERISA preempts State laws that provide for the appointment of a conservator for an incompetent or incapacitated plan participant or beneficiary or that distribution to such a fiduciary on behalf of the conservatee violates the exclusive benefit or anti-alienation provisions. Because the State functions as a fiduciary for a lost or missing participant, *a fortiori* it cannot reasonably be argued that State unclaimed property laws violate these ERISA provisions.

Because no substantive distinction can be drawn between the unclaimed property statute involved in *Aetna Life* and in this case, nor between an employee welfare plan and an employee pension plan, the decision of the Seventh Circuit irreconcilably conflicts with that of the Second Circuit in *Aetna Life* and those cases that have indicated its authoritativeness. Thus, the Seventh Circuit decision creates confusion and uncertainty in this area of

the law. What the Supreme Court concluded in *California Div. Of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, is equally applicable here: "[a] reading of § 514(a) resulting in the preemption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say [is] 'unsettling.' " 519 U.S. 316, 330 (1997), quoting *NY Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 665 (1995). The Seventh Circuit decision will inevitably lead to further litigation between ERISA fiduciaries and State unclaimed property administrators in federal courts throughout the United States.

CONCLUSION

The *amici* States urge the Supreme Court to grant the Writ of Certiorari as sought by the Petitioner, the State Treasurer of Illinois, and then to reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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